No. 92-1757

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROSS MIDDLEMIST, WAYNE W. MAUGHAN,
FLATHEAD JOINT BOARD OF CONTROL,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, Bruce Babbitt; DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, PORTLAND AREA, Stanley M. Speaks; SUPERINTENDENT OF THE BIA FLATHEAD AGENCY, Ernest Moran, in their official capacities; MEMBERS OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Michael Pablo, Sonny Morigeau, Louis Adams, Hank Baylor, Fred Matt, Tony Incashola, John Lozeau, Lloyd Irvine, Patrick Lefthand, Laurence Kenmille; DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Rhonda R. Swaney; ADMINISTRATOR OF THE SHORELINE PROTECTION OFFICE OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, J. Lloyd Jackson; MEMBERS OF THE SHORELINE PROTECTION BOARD OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, Joseph Schneider, Gem Mercer, Al Hewankorn, Donald Lucas, Thurman Trosper, Henry Normandeau,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. IN LIGHT OF THE MANY PEOPLE AFFECTED BY THIS ISSUE, THE FUNDAMENTAL RIGHTS AT STAKE, AND THE RESPONDENTS' DISREGARD FOR BOTH THIS COURT'S DECISIONS AND CONSTITUTIONAL LIMITS ON TRIBAL GOVERNMENT AUTHORITY OVER NONMEMBERS, IMMEDIATE REVIEW BY THE COURT IS APPROPRIATE.

The Petitioners (hereinafter "Middlemist") and the tribal government respondents (hereinafter "CSKT government") agree on certain fundamental facts: the Bill of Rights does not limit tribal governments, and individuals under their power do not enjoy the basic protections it provides; other Constitutional limits do not bind tribal governments, since their retained sovereignty after incorporation within the United States derives from some unidentified, extra-constitutional source; and nonmembers have no right of political participation in tribal government. Nonetheless, the United States, acting through its agencies, has required Middlemist to submit to tribal authority and the CSKT government's limitations on the use of their own fee land contained in tribal Ordinance 87A.[1]

The inescapable consequence of these facts is that the issue raised here goes to the security of the constitutional rights and protections of nearly 400,000 nonmembers residing on Indian reservations nationwide.[2] It goes to

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[1] The federal Respondents, however, did not respond to Middlemist's Petition, failing to explain to the Court their grounds for this action. They also fail to explain whether they approve of the piecemeal litigation which will result if Middlemist must first go to tribal forums to vindicate their rights against the tribal defendants and then to federal courts to vindicate the same rights against federal actors.

[2] The frequency with which this Court addresses issues of tribal jurisdiction and State jurisdiction on reservations indicates the importance of these issues in general. Most often, the Court hears from the sovereigns involved. In this case, nonmembers, who rarely have the resources to bring such challenges but who are the source of the State's sovereign interest in these issues, seek to defend their

whether this Court's decisions bind tribal governments and bar baseless assertions of authority over nonmembers on their own fee land. It goes to whether tribal governments, aided and abetted by the federal government, will be allowed to systematically ignore substantive decisions limiting tribal jurisdiction, hiding behind the cloak of the "exhaustion" doctrine even when a facial challenge to their asertions of power is brought and no ongoing tribal proceeding exists. It goes to whether the "exhaustion" doctrine applies when federal defendants who are proper parties cannot be brought into tribal court, when the result would be piecemeal litigation which strips plaintiffs of their right to control their litigation and have their grievances against federal actors heard in a federal forum.

These facts and this Court's decisions, particularly *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), demonstrate the federal and CSKT governments' assertion of tribal jurisdiction here clearly violates constitutional and decisional limits on tribal governmental authority. The CSKT government prefers to rely on two inapposite decisions concerning the exhaustion of tribal remedies, citing them for the proposition that tribal government presumptively possesses the authority Middlemist challenges. *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).[3] The CSKT government baldly as-

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own rights, rather than the sovereign interests of the State. There are, however, no conflicts between these interests.

[3] The CSKT government places much confidence in the Ninth Circuit Court of Appeals' decisions concerning this doctrine which have expanded on the decisions of this Court to create, in essence, a mandatory "exhaustion" rule. (Response, p. 5, n.4.) Indeed, the Respondents argue the Ninth Circuit has repeatedly and fully addressed the issues here, and, based on that, the outcome in the Court of Appeals will undoubtedly favor the CSKT government's position. Response, p. 5, n.4. If correct, this only strengthens Middlemist's argument that immediate review in this Court is appropriate.

serts that Middlemist should "accept the fact of life" that the Bill of Rights and other Constitutional protections are simply not available to nonmembers under tribal government control. (Response, p. 9.)

The CSKT government however, never explains how it could possibly possess the governmental power at issue here when *Montana* and *Brendale* unequivocally teach that in the absence of express congressional delegation of authority, tribal governments lack authority over nonmembers in this situation. In addition to ignoring the holdings of these decisions, the CSKT government ignores the Court's unequivocal statement in *Brendale*, 492 U.S. at 427, n.10, that the decisions in *National Farmers* and *Iowa Mutual* did not address the substance of tribal sovereignty, which is the central issue here. Indeed, Middlemist has clearly and correctly argued the applicability of a recognized exception to the exhaustion doctrine for cases where the challenged action patently violates jurisdictional limits, which brings the substance of tribal government jurisdiction over nonmembers directly into question.

II. THE CHALLENGED TRIBAL ORDINANCE AND FEDERAL ACTIONS CLEARLY VIOLATE CONSTITUTIONAL AND DECISIONAL LIMITS ON TRIBAL AUTHORITY OVER NONMEMBERS AND CAN ONLY BE HEARD IN A FEDERAL FORUM.

Middlemist stands on the strength of this Court's clear pronouncements in *Montana* and *Brendale*, as well as the long line of decisions on which they are based. These decisions hold that in this relatively narrow situation—involving nonmember fee land within the boundaries of a reservation opened by Congress to nonmember settlement, from which nonmembers may not be excluded, and in the absence of an express and unequivocal delegation of authority from Congress—tribal governments lack jurisdiction over the activity of nonmembers. *Montana* clearly established the general principle, and set out the support-

ing reasons, that tribal governments do not have authority in this situation. *Montana* 450 U.S. at 564-566.

Brendale further advanced the analysis to the point where, in the factual situation presented by the Comlaint here, which the CSKT government cannot materially dispute, there can be no question tribal government lacks the authority it asserts. In this situation *Brendale* clearly taught that a detailed study of the impact on a particular Tribe's preconstitutional sovereignty resulting from specific treaties, congressional acts and executive branch policies is not necessary (although the result would be the same here). *Brendale,* 492 U.S. at 426, n.9. Instead, in this situation, which involves tribal government's "external relations," general principles of law hold that tribal governments lack authority, and specific treaties or statutes need not be consulted. *Id.*

Middlemist's position ultimately rests on the Constitution and the rights and protections it offers all citizens. This foundational limit on tribal government authority over nonmembers on their own fee land, Middlemist submits, has been implicit in the Court's decisions from the earliest encounters with the issue. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Because of the relatively recent refusal of some tribal governments, notably the CSKT government, to admit any fundamental limits on their power, the implicit constitutional bases for limiting tribal jurisdiction over nonmembers to "very narrow" circumstances must be made explicit. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, —— U.S. ——, 112 S.Ct. 683, 692 (1992).

There exists no reason to await, as the CSKT government suggests, the development of an enormous body of data illustrating the pernicious effects of tribal governance of nonmembers to whom it accords no rights. Response, p. 8. There is nothing to be gained in developing "reams of findings, studies and analysis" detailing civil rights and human rights abuses by nondemocratic tribal governments in dealing with nonmembers. *Id.* Neither tribal govern-

ments nor nonmembers would benefit from delaying the resolution of this matter until a crisis atmosphere arises. Segregation in public schools and denial of voting rights were patently unconstitutional acts when they occurred in the 1950's and 1960's and before, and today such actions would not require reams of findings and studies concerning their ill-effects to be judicially halted. The CSKT government's assertion of authority over nonmembers, to whom it accords no political rights, is no different.

The struggle to secure respect for the basic rights of all citizens has been long and arduous. Now, after almost two-hundred years of jurisprudence recognizing fundamental limits on tribal government authority over nonmembers, after many years spent by this Court expounding, defining and protecting the civil rights and liberties of U.S. citizens, there is no reason to turn away from this historical limit on tribal authority and leave nonmembers in a position where their constitutional rights are neither respected nor protected.

CONCLUSION

Middlemist respectfully asks the Court to reject the CSKT government's denigration of the fundamental rights at issue here and to issue the Writ of Certiorari to the Ninth Circuit Court of Appeals requested in the Petition.

DATED this 3rd day of June, 1993.

Respectfully submitted,

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